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REPLY BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

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REPLY BRIEF OF ARIZONA PUBLIC SERVICE COMPANY, ET AL.

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INTRODUCTION

Parts I-IV of this brief answer our opponents' argument as to the "project works" licensing jurisdiction of the Federal Power Commission.

Parts V and VI answer their argument as to the Commission's "surplus water" licensing jurisdiction.

I. THE FEDERAL WATER POWER ACT CANNOT BE CONSTRUED AS INCLUDING STEAM PLANTS WITHIN THE COMMISSION'S LICENSING JURISDICTION UNLESS THE RATIONALE OF THE TAUM SAUK DECISION IS REJECTED.

The majority opinion in the *Taum Sauk* licensing case, *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), authored by Mr. Justice White, holding that a pumped-storage hydro plant required a license, said that "the distinction between a hydroelectric project and a steam plant is obvious and meaningful, although both produce energy for interstate transmission."[1]

The dissenting opinion, by Mr. Justice Goldberg, in which Mr. Justice Harlan and Mr. Justice Stewart joined, said that ". . . the legislative history here, however, establishes to my satisfaction that it [the Act] has required licenses of neither steam plants nor the type of hydroelectric plant here involved. . . ." (*Id.* at 115.)

Both authors were answering the argument that if the test of FPC's licensing jurisdiction under Sections 4(e) and 23(b) were the effect of a given generating plant on interstate transmission, rather than its effect on navigable capacity, there was no distinction between a pumped-storage plant (involved there) and a steam plant. If our opponents were right about steam plants, the ready premise for Mr. Justice White's holding that a pumped-storage plant requires a license would have been to agree that both plants are indeed in the same situation, hence the pumped-storage plant requires a license because the steam plant requires one. Rejecting this, the Justice made the pointed distinction that pumped-storage plants are subject to

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[1] FPC v. Union Electric Co., 381 U.S. 90, 110 (1965). Our opponents flatly contradict this, saying (Opp. Br. 53), ". . . this distinction is *not* obvious and meaningful . . . ."

license because "Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water," but steam plants are excluded because of "this central concern of the Act." Our opponents' argument that the Court's language which made this distinction should be disregarded now, because the Court was not then fully informed, needs no answer. And our opponents are equally at odds with the minority opinion which, even though it posited that there was no jurisdictional distinction between steam plants and pumped-storage plants, concluded that the legislative history establishes that licenses are required of neither of them.

II. THE ARGUMENT THAT IN 1920 CONGRESS INTENDED TO REQUIRE LICENSING OF STEAM PLANTS, WITHOUT SAYING SO, IS REBUTTED BY EVERY CANON OF STATUTORY CONSTRUCTION.

A. All nine Justices in the Taum Sauk case looked to the same guides for construction of the Federal Power Act that we urge here.

The majority examined the history of the predecessor statutes (pp. 98-99). They quoted the title, saying (p. 99), "the principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." They said (p. 100) that "the provisions of the Act reflects these objectives," noting (p. 100) that "the preface states that beside navigation and the creation of the Commission, the Act was 'to provide for the . . . development of water power; the use of the public lands in relation thereto . . . and for other purposes'." The Court also examined the legislative history in detail (pp. 101-08) to determine Congress' intent.

The minority, as we have noted, looked to the same criteria, annexing two appendixes detailing the legislative history (pp. 115-23).

B. The "unadorned," "plain," language of the Act, which does not mention steam plants, certainly does not close the door on legislative history, as our opponents contend.

Our opponents say that the legislative history quoted in our opening brief and its supplement is irrelevant, because the "unadorned" language of the Act plainly gives the Commission licensing jurisdiction over steam plants (Opp. Br. 10).

The Court in the *Taum Sauk* case did not discover this "plain meaning," notwithstanding its holding (p. 100) that "the purposes of the Act are more fully served if the Commission must, as it held in this case, consider the impact of the project on the full spectrum of commerce interests." Yet it excluded steam plants from this "spectrum," after an exhaustive analysis of the language of the Act and its legislative history, finding no "unadorned language" which included steam plants. Nor did the minority, which excluded them after an equally searching analysis of the legislative history (p. 115).

All of these factors which were treated as relevant to the meaning of the Federal Power Act in the *Taum Sauk* case should now be ignored, according to the complainants, in favor of the literalness of the terms "project works" and "surplus water," even though "literalness may strangle meaning," *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946), and even though "this Court [has] repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute." *Lynch* v. *Over-*

holser, 369 U.S. 705, 710 (1962); *Church of Holy Trinity* v. *United States,* 143 U.S. 457 (1892).

When words such as "project works" or "surplus water," which are inherently imprecise, are used in a statute, this Court looks, *inter alia,* to legislative history to determine a statute's meaning. *E.g., U.S.* v. *American Trucking Association,* 310 U.S. 534, 543-44 (1940) ("employees"); *United States* v. *Rosenblum Truck Lines,* 315 U.S. 50 (1942) ("common carrier"); *Maestro Plastic Corp.* v. *NLRB,* 350 U.S. 270 (1956) ("any strike").

Contrary to the complainant's views, the proper method of statutory interpretation has been stated by this Court as follows:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the

> policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Association,* 310 U.S. 534, 543-44 (1940).

Construction of the Federal Power Act should be no exception.

C. The curious argument that the Act includes steam plants because "Congress was not thinking about steam plants at all" (Opp. Br. 26) collapses of its own weight.

This is not a case which presents the problem of whether a statute written in comprehensive terms includes a business which comes into existence after its enactment, as argued in the opposing brief, pp. 32-40, with reference to such instances as cable television,[2] radio broadcasting, etc.

By contrast, all sides agree that steam plants were not only in existence in 1920, but that they accounted for the greater part of the electrical power production of this country at that time, as they do now.[3] Congress,

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[2] The FCC has "broad responsibilities for the orderly development of an appropriate system of local television broadcasting," United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968), and the Communications Act envisions a "unified and comprehensive regulatory system for the industry." *Id.* at 168. It cannot be said that the Federal Power Act evinces Congress' intent to regulate all sources of electricity, including nuclear plants, fossil-fuel plants not proximate to navigable waters, geothermal plants, gas turbines and diesel plants, and the plants involved in this case.

[3] Chemehuevi Tribe of Indians, et al. v. FPC, 489 F.2d 1207, 1216-17, and n. 43, 1229-30 (D.C. Cir. 1973); *see* Udall v. FPC, 387 U.S. 428, 445-47, n. 11 (1967).

in 1920, knew a great deal about steam plants, which were mentioned repeatedly in the debates as unlicensed competitors of the hydro projects intended to be licensed.[4]

D. The administrative construction of the Act as excluding steam plant licensing was repeatedly and consistently reported to Congress over a period of a half century, and is entitled to great weight.

The Commission's first report to Congress in 1921 stated that its jurisdiction was limited to hydro power projects. The opposing brief points out that the Commissioners so reporting did not hold office during the previous year (Opp. Br. 47), when Congress enacted the Act. This is quite immaterial. They were the men charged with responsibility for "setting its machinery in motion."[5] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). This administrative construction was reported consistently in at least 23 annual reports thereafter,[6] and is entitled to "great weight." *Trafficante*

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[4] *E.g.*, 51 CONG. REC. 12336, 12593, 12777 (1914); 53 CONG. REC. 2640, 10450 (1916); 56 CONG. REC. 8931, 9282 (1918); 59 CONG. REC. 1101, 1430, 1473 (1920). Congress desired to foster water power development as a means to encourage conservation of coal and oil. *E.g.*, 56 CONG. REC. 9112 (1918); 59 CONG. REC. 241, 1223, 6532 (1919).

[5] As it happened, O. C. Merrill, a principal architect of the Federal Water Power Act, lauded by our opponents (Opp. Br. 50), was the Executive Secretary of the Commission at the time this report was prepared and submitted to Congress.

[6] See the Commission's Annual Reports for the following years: 1935, p. 1; 1939, p. 2; 1940, pp. 1-5; 1946, pp. 2-3; 1949, p. 3; 1950, p. 3; 1951, p. 2; 1956, pp. 3, 5; 1957, pp. 3, 4; 1958, p. 4; 1959, p. 4; 1960, p. 5; 1961, p. 7; 1962, pp. 8, 12-13; 1963, p. 7; 1964, pp. 10-11, 13; 1965, p. 10; 1966, pp. 8-9, 13; 1967, p. 25; 1968, p. 29; 1969, p. 25; 1970, p. 31; 1971, p. 22.

v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

III. SUBSEQUENT CONSISTENT REFUSAL BY CONGRESS TO GRANT THE COMMISSION LICENSING JURISDICTION OVER STEAM PLANTS IS DISPOSITIVE AS TO LEGISLATIVE INTENT.

Complainants' brief ignores the occasions, at least four in number, on which Congress has declined to amend the Federal Power Act to grant the Federal Power Commission jurisdiction to license steam plants.

In 1935 Congress enacted the Federal Power Act, which included, as Part I, the entire text of the Federal Water Power Act, and added, as Part II, regulatory provisions relating to utilities' rates, interconnections, securities, etc. An amendment was proposed to the portion of the bill which became Title II, to add a section which would grant the Commission authority to "certificate" (license) all forms of "production facilities" and transmission lines. It was rejected in committee, in the Senate.[7] Senator Wheeler, the author of the pending bill, explained on the Senate floor:

> "Mr. Wheeler: . . . Let me say this further to the Senator: The bill as it was originally prepared by the proponents and introduced contained a provision to the effect that a power company would have to come to the commission for a certificate of convenience and necessity before it could construct a power plant, or a transformer, or anything else of that kind, within a State. In the committee, I insisted that this be stricken out, because I felt that we should not go so far in this bill, because it was not necessary." 79 Cong. Rec. 8431 (1935).

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[7] S. Rep. No. 621, 74th Cong., 1st Sess. 20 (1935).

Instead, Congress in 1935 reenacted Section 4(e) of the Federal Water Power Act (16 U.S.C. 797(e)) without change as part of Title I of the Federal Power Act, and added the first sentence of Section 23(b) (16 U.S.C. 817),[8] well informed of the Commission's construction that its licensing jurisdiction was limited to hydro projects. This Court has held that congressional reenactment of a statute, in knowledge of consistent administrative interpretation of it, is significant as indicating satisfaction with that interpretation. *Cammarano* v. *United States,* 358 U.S. 498, 510-11 (1958); *Massachusetts Mut. L. Ins. Co.* v. *United States,* 288 U.S. 269, 273 (1933).

The 1935 decision by Congress, in our view, disposes of our opponents' case.

Congress' subsequent actions confirmed its 1935 decision. In 1962, 1971, and 1972, Congress considered the renewed request of the Commission to license steam plants, and heard its supporting testimony to the effect that it did not have, but should have, this authority.[9] Congress did not grant the request.

The consistent course followed by Congress for a half-century was not congressional inaction; it mani-

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[8] These are the two sections which contain references to "surplus water or water power from any government dam."

[9] FORTY-SECOND ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, 102-03 (1962); *Hearings on Power Plant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 1st Sess. 411 (1971) (Statement of Chairman Nassikas); *Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 92d Cong., 2d Sess. 249, 261 (1972) (Statement of Chairman Nassikas).

fested a continuing and consistent determination to stay out of the field.

IV. THE "CHANGED CIRCUMSTANCES" ARGUMENT IS PIERCED BY ITS OWN STATISTICS.

It is argued (Opp. Br. 20) that "Congress did not consider whether steam plants needed to be regulated in 1920 because their operations had no effect on the hydro potential of navigable streams, but fundamental changes in their method of operations have now brought steam plants within the range of evils Congress sought to regulate under the Federal Power Act; under these circumstances, jurisdiction should be construed expansively."

If this were so, it might be thought that Congress, in this half-century, would have discovered this and legislated to expand the FPC's licensing jurisdiction to include steam plants. The record is to the contrary. By 1935, when Congress rejected an amendment which would have done this (*supra*, p. 8), the capacity of steam generating plants, which had been 8,920,000 kw in 1920, had more than doubled, to 24,471,000 kw.[10] By 1962, when it refused to act on FPC's request for jurisdiction to license steam plants (*supra*, n. 9), their capacity had increased to 149,943, 000 kw,[11] nearly 16 times the 1920 figure. By 1972, when Congress again received, but did not act upon, FPC's renewed request for licensing jurisdiction over steam plants (*supra*, n. 9), their capacity had increased to 322,944,000 kw,[12]

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[10] EDISON ELECTRIC INSTITUTE, HISTORICAL STATISTICS OF THE ELECTRIC UTILITY INDUSTRY 4 (1962).

[11] EDISON ELECTRIC INSTITUTE, STATISTICAL YEARBOOK OF THE ELECTRIC UTILITY INDUSTRY FOR 1973 at 6 (1974).

[12] *Id.*

over 35 times the 1920 level. The consistent congressional decision has been to leave the matter of certification of steam plants with the States in which the plants are located.

And it is quite misleading to base a claim for expansion of licensing jurisdiction to encompass steam plants on assertions that there have been "fundamental changes in their method of operation" (Opp. Br. 26). The change alleged is that whereas in 1920 "they returned virtually all their cooling water to the streams, so that it could be used again for other purposes, such as hydro generation" (Opp. Br. 29), now they "permanently and substantially diminish the total volume of the river, and, thus, the hydro-electric power potential at all downstream water power sites" (Opp. Br. 31). But the statistics give an opposite answer.

First, on a national scale over 99.2% of the water diverted for cooling in 1971 (the latest year for which such data have been published) was returned to the stream, and there was thus no great reduction of the flow.[13]

Second, the argument that consumption of cooling water in steam plants reduces the quantity available for downstream hydro generation (Opp. Br. 31) is subject to a *reductio ad absurdum*. For example, the consumption of an acre-foot of water in the cooling system of the Navajo steam plant at Lake Powell facilitates the production of 504,000 kwh of energy, whereas the same acre-foot falling from Lake Powell through Glen Canyon, Hoover, Davis, and Parker hydro plants

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[13] FPC, STEAM ELECTRIC PLANT AIR AND WATER QUALITY CONTROL DATA: SUMMARY REPORT 24 (1974) (hereinafter "FPC 1974 Summary Report"). Of 172,391 cubic feet per second diverted, 171,142 cubic feet per second were discharged back to the stream.

would generate 1,162 kwh—a ratio of 434 to 1 in favor of use of water in the steam plant.[14] Thus, if the complainants' argument of relative productivity of water in power generation has any relevance, it works against them.

Third, our opponents' comparison of total future requirements for cooling water with total run-off of streams (Opp. Br. 31), if relevant at all, fails to take account of the number of fossil-fuel plants that use salt water for cooling, or the number of nuclear-powered plants that use either fresh or salt cooling water, both types of plants being outside the Commission's licensing jurisdiction on any construction of the Act.[15]

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[14] One acre-foot of falling water generates 461 kwh at Glen Canyon Dam, 492 kwh at Hoover Dam, 130 kwh at Davis Dam, and 79 kwh at Parker Dam. These values are determined by multiplying the rated head for each dam by a factor of 1.025. Thus, one acre-foot of water falling over all four dams generates (461 + 492 + 130 + 79) = 1,162 kwh.

The energy generation (504,000 kwh) facilitated by the consumption of one acre-foot of water at the Navajo Plant is determined by multiplying the plant's total net capacity (2,310,000 kw) by the plant factor (0.85), multiplying the result by the number of hours in a year (8,760), and dividing the result by the rate at which the plant consumes water (34,100 acre-feet per year).

The ratio of energy production at the Navajo Plant facilitated by one acre-foot of water to the energy generation caused by one acre-foot of water falling over all four dams is:

$$\frac{504{,}000}{1{,}162} = \frac{434}{1}$$

[15] In 1971, the latest year for which the FPC has published relevant figures, 125 generating plants with a total generating capacity of 61,013,000 kw, used saline water for cooling. This compares with 331 plants, with a total generating capacity of 135,332,000 kw, using "once-through" fresh water cooling systems. All other

V. THE QUESTION OF WHETHER THE "SURPLUS WATER" LICENSING CLAUSE IS GENERALLY APPLICABLE TO STEAM PLANTS DOES NOT REQUIRE DECISION IN THIS COLORADO RIVER CASE.

A. A Federal Power Commission license for the consumptive use of water stored by government dams on the Colorado River would be a nullity; authority to grant such a right is vested exclusively in the Secretary of the Interior.

If it is decided that the court of appeals was right in holding that steam plants are not "project works" requiring licenses in consequence of their use of navigable waters of the United States or of government lands, this case is finished. The further question of whether the surplus water clause would be an independent source of licensing jurisdiction is not required to be decided with respect to uses of waters of the Colorado River, because, as shown in our opening brief (pp. 21-38), Congress, in this basin, has displaced the surplus water license with the secretarial contract as the exclusive source of right to consume water supplied from government dams.[16] FPC licensing jurisdiction cannot be founded merely on the fact that a steam plant is consuming water supplied it from a government dam, exercising a privilege which the Com-

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types of cooling (ponds, cooling towers, combined systems) accounted for 233 plants with a total generating capacity of 87,063,000 kw. FPC Summary Report, table 6A, p. 21. Sources of cooling water, outside the scope of the Federal Power Act on any construction, include effluents from sewage treatment and industrial waste plants, and wells. Dry-air cooling, using no water in the cooling process, is technologically feasible, although less efficient than water-cooling.

[16] A surplus water license, even for a hydro project on the Colorado River, would be worthless unless it could command the Secretary as to the quantities that he must release from the dam, at what discharge rate, in what months, and at what hours. Of course the Commission can do no such thing.

mission cannot give, but which can only be granted (and has been granted in this case) by the Secretary. A surplus water license, if issued, could neither enlarge nor diminish the right conferred by the Secretary's water contract.

The opposing brief argues that the "Law of the River" which lodges in the Secretary of the Interior the exclusive power to grant, by contract, the right to use water stored by a government dam, is simply analogous to cases in which Congress requires that permits be obtained from several government agencies before some kinds of businesses can be conducted (Opp. Br. 76-78). The thought seems to be that a steam plant consuming water supplied from Hoover Dam, or Glen Canyon Dam, or Navajo Dam, or Emery County Project Dam, must obtain both an FPC surplus water license and an Interior Department water contract. Not so. The two documents serve the same function, as we shall see in examining the legislative history and administrative construction of surplus water licenses for the use by hydro plants of water supplied from government dams on navigable streams (*infra*, Part VI).

B. The assertion that this case reveals a dangerous "gap," through which "the Colorado River is flowing, unregulated, into the hands of the power companies" (Opp. Br. 40), is pure sophistry.

The Colorado is the most completely regulated river in the country. Four statutes, the Boulder Canyon Project Act (1928), the Reclamation Project Act of 1939, the Colorado River Storage Project Act (1954), and the Colorado River Basin Project Act (1968) give the Secretary complete control over release of water

from government dams for consumptive use, and require contracts with the Secretary for that use. The Federal Power Commission licenses hydroelectric projects, but no statute directs the Secretary to share with the Commission his plenary powers over consumptive use of water stored by government dams (powers which are much greater than those of a state water allocation officer, contrary to our opponents' contention, Opp. Br. 77). Complainants seek to stop, not regulate,[17] consumptive uses specifically authorized by the Secretary's contracts, and, in two instances (Navajo and San Juan), specifically authorized by Congress.

On the Colorado, neither "private power interests" nor any other interests can "appropriate for themselves the public's valuable resources in the power potential of navigable streams," thus requiring the "curb" of the Federal Power Act (Opp. Br. 20). Here, as elsewhere, no one has a property interest in running water, *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940). Here, uniquely, the United States itself, by "congressional legislation and by acts of its officers which that legislation authorizes, has undertaken . . . to impound, and control the disposition of, the surplus water in the river not already appropriated." *Arizona* v. *California*, 298 U.S. 558, 570 (1936). The control is in the form of statutory prohibition of the use of impounded water except by contract with the Secretary of the Interior. (Our opening brief, pp. 21-38.)

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[17] Complainants in the present case sought an order to show cause why the owners of the plants "should not be required to suspend all development, planning and construction of the plants in question, pending the outcome of these proceedings" (App. 11a).

C. The argument that the FPC must license steam plants because it is responsible for planning comprehensive river development (Opp. Br. 42) is demolished by the Colorado River statutes.

The opposing brief (p. 42, *et seq.*) would deduce a mandate for comprehensive licensing from the comprehensive planning responsibility given the Commission in Section 10(a) of the Federal Power Act. But, on the Colorado, the Commission's comprehensive planning function, like the function of a surplus water license, has been overtaken and displaced by subsequent legislation.

By law, the Secretary, in concert with the States, determines what uses of Colorado River water, for municipal purposes or by industry or by agriculture, will effectuate optimum use of the resource. Section 15 of the Boulder Canyon Project Act (43 U.S.C. 617n) directed the Secretary to formulate "a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries." In so doing, he is made subject to the Colorado River Compact among the seven basin States (43 U.S.C. 617g), which Congress approved in the same Act (43 U.S.C. 617*l*). The Upper Colorado River Basin Project Act expanded this in 1956. The Secretary was "directed to continue studies and to make a report to the Congress and to the States of the Colorado River Basin on the quality of water of the Colorado River" (43 U.S.C. 620n). In 1962 Congress intensified its directive, ordering the Secretary "to estimate the effect of additional development involving its storage and use (whether heretofore authorized or contemplated for authorization) on the remaining water available for use in the United States, to study all possible means of improving the quality of such water

and of alleviating the ill effects of water of poor quality, and to report the results of his studies and estimates to the Eighty-seventh Congress and every two years thereafter" (43 U.S.C. 615ww). In 1968, in the Colorado River Basin Project Act, Congress amplified this to require, *inter alia*, "full and complete reconnaissance investigations for the purpose of developing a general plan to meet the future water needs of the Western United States" (43 U.S.C. 1511), and "condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact" (43 U.S.C. 1551), and ordered that "Rights of the upper basin to the consumptive use of water available to that basin from the Colorado River system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin" (43 U.S.C. 1553). The last provision conclusively deprives the Chemehuevi and Cocopah Tribes, *qua* water users, of standing to complain of uses of water by the five Upper Basin power plants, just as the decree in *Arizona* v. *California*, 376 U.S. 340 (1964), deprives these water users, like all other water users in California and Arizona, of any right to complain of uses by the Mohave Plant in Nevada.[18]

Nothing in all of this consistent delegation of planning authority to the Secretary hints any intention to

[18] Moreover, as our initial brief pointed out (pp. 40-41), the Chemehuevis and Cocopahs have present perfected rights fully protected by the Colorado River Compact and this Court's decree in Arizona v. California. If they have complaints about water quantity or salinity, the FPC is not the forum in which to decide those complaints. This Court reserved jurisdiction in Article IX of its decree (376 U.S. 340, 353).

subject its exercise to control by the Federal Power Commission,[19] and of course the Commission makes no such contention.

In the meantime, in 1965, in the Water Resources Planning Act, Congress created the Water Resources Council (42 U.S.C. 1962a), consisting of the Secretaries of the Departments of Interior, Agriculture, Army, Health, Education and Welfare, and the Chairman of the Federal Power Commission. (The President named the Secretary of the Interior Chairman.) The Council was directed to establish, "with the approval of the President, principles, standards, and procedures for federal participants in the preparation of comprehensive regional or river basin plans . . . ." (42 U.S.C. 1962a-2.) The uses which are attacked in this case are included in, or consistent with, the Secretary's comprehensive plans,[20] continuously evolving in consultations among the States and federal agencies, including FPC, through the clearing house of the National Water Resources Council.[21] The statutes do not authorize FPC to supersede these plans with its own, and the Commission does not contend otherwise.

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[19] This planning responsibility has been diligently discharged, as evidenced by the Secretary's voluminous reports. Examples are listed in Appendix A to this brief.

[20] *E.g.*, DEPARTMENT OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972); DEPARTMENT OF THE INTERIOR, THE CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES (1974) (REVIEW DRAFT); REPORT ON WATER FOR ENERGY IN THE UPPER COLORADO RIVER BASIN (July 1974).

[21] *E.g.*, WATER RESOURCES COUNCIL, UPPER COLORADO REGION, COMPREHENSIVE FRAMEWORK STUDY (1971) (see Appendix XIV, ELECTRIC POWER); WATER RESOURCES COUNCIL, LOWER COLORADO REGION, COMPREHENSIVE FRAMEWORK STUDY (1971) (see Appendix XIV, ELECTRIC POWER).

D. The asserted concern of the Indians about the effect of these relatively small consumptive uses on downstream hydro plants (Opp. Br. 23, 31) and salinity (Opp. Br. 31, 90) could not be litigated in the absence of the seven States which are parties to the Colorado River Compact, and the parties to the decree in Arizona v. California.

It is said that these six steam plants will use 2% of the Colorado River water supply, and that uses by other steam plants on the river and its tributaries may ultimately increase to 5% (Opp. Br. 23). Putting to one side the fact that even the larger of these figures is so small as to be exceeded by the unavoidable percentage of errors of hydrologic measurement, the important point, missed by our opponents, is that it is for the Secretary and the States, under existing law, to make the value judgment of whether several million people shall be benefited by the electricity made available by the use of such small quantities of water for this purpose, or whether the public interest would be better served by irrigating a few thousand acres of land with the same water, as the Colorado River Compact permits to be done.

The States in which these plants are located cannot be denied the consumptive use of the quantities of water allocated to them by the compacts and by the decree of this Court in *Arizona* v. *California*, 376 U.S. 340 (1964). The question of whether the water apportioned should be used by agriculture or municipalities or industry (including steam plants) is not in the jurisdiction of the Federal Power Commission but in that of the States and the Secretary in collaboration. Our opponents contend that consumptive use by these plants "will diminish the potential for production of power at Federal hydroelectric facilities at Boulder, Glen Canyon, and other

downstream government dams by a substantial amount" (Opp. Br. 23), ignoring the fact that these depletions are protected by the apportionments made by the Colorado River Compact and this Court's decree in *Arizona* v. *California*. This is a rather officious argument in any event, because it is the Secretary of the Interior who has responsibility for the power production at those dams, and that same Secretary executed the consumptive use water contracts involved in this case.

E. The environmental statutes do not transfer the Secretary's control of stored water to the Federal Power Commission.

It is argued that unnamed "protections and opportunities" to mitigate environmental impact are available "only before the FPC," not the Secretary of the Interior, and that "there is an obvious disparity in the remedies available in the event of an unfavorable decision." (Opp. Br. 90.)

Unless the FPC had licensing authority in the first place, all this, even if true, would be irrelevant.

But it is a curiously blindfolded argument. In plain sight is the whole spectrum of laws for the protection of the environment,[22] all applicable equally to control the actions and decisions of all federal agencies. The Environmental Protection Agency, for example, has promulgated regulations on the very subject with which complainants express their concern, the effect of steam plant operations on quality of water. See EPA, Thermal Discharges, 40 C.F.R. ch. 40, Part 122, 39 Fed. Reg. 36176, Oct. 8, 1974; EPA, Steam Electric Power Generating Point Source Category:

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[22] *E.g.*, the Clean Air Act, 42 U.S.C. 1857; the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251; the National Environmental Policy Act, 42 U.S.C. 4321.

Effluent Guidelines and Standards, 40 C.F.R. ch. 1, Part 423, 39 Fed. Reg. 36186, Oct. 8, 1974.[23] See also additional regulations proposed by EPA, Steam Electric Power Generating Source Category: Proposed Effluent Guidelines and Standards for Incompatible Pollutants, 39 Fed. Reg. 36210, Oct. 8, 1974.

Congress repeatedly, most recently in the Colorado River Basin Salinity Control Act, Pub. L. No. 93-320, 88 Stat. 266, 7 U.S. CODE CONG. AND ADMIN. NEWS 1685 (Aug. 15, 1974), has charged the Secretary, not the Commission, with authority and responsibility for solving the salinity problem in cooperation with the Environmental Protection Agency.[24]

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[23] See the detailed supporting paper, EPA, DEVELOPMENT DOCUMENT FOR PROPOSED EFFLUENT LIMITATION GUIDELINES AND NEW SOURCE PERFORMANCE STANDARDS FOR THE STEAM ELECTRIC POWER GENERATING POINT SOURCE CATEGORY. This contains useful descriptions of the functions and environmental effects of cooling water, particularly in the discussions at 255, 275, and 313-451.

It must not be thought that the environmental consequences of the six plants are not presently regulated. Under the provisions of the water service contracts for these plants, for example, the Secretary of the Interior must review and approve the various systems which have an impact on the environment. These contracts are on file with the Clerk of the Court.

[24] The Environmental Protection Agency, in collaboration with the Secretary and the States, has formulated and published in the Federal Register, 39 Fed. Reg. 43721 (Dec. 18, 1974), a "salinity control policy and procedures and requirements for establishing water quality standards for salinity and a plan of implementation for salinity control in the Colorado River System . . .", looking toward adoption of water quality standards by 1975. It provides that: "(ii) The salinity problem shall be treated as a basinwide problem that needs to be solved in order to maintain lower main stem salinity at or below 1972 levels while the basin States continue to develop their compact-apportioned waters.

"(iii) The goal of the plan shall be to achieve compliance with the adopted standards by July 1, 1983 . . . ."

The Sierra Club had objected to paragraph (ii) among others.

VI. THERE IS NO SUPPORT FOR THE NOTION THAT THE SURPLUS WATER CLAUSE WAS INTENDED TO BRING STEAM PLANTS INTO THE FPC'S LICENSING JURISDICTION, UNANNOUNCED, BY THE BACK DOOR.

As to the "surplus water" clause, considered independently of the superseding effect of the Colorado River legislation:

The opposing argument (Opp. Br. 59) is that all hydroelectric projects are located on streams deemed navigable waters of the United States(Opp. Br. 61), hence require "project workers licenses" anyhow, whether or not using water from government dams; therefore "the surplus water clause can have independent significance only if construed to cover facilities other than hydro plants"[25] (Opp. Br. 61); this, by subtraction, means steam plants, even though the Act and its legislative history contain no hint of this, and complainants believe that "Congress was not thinking about steam plants at all" (Opp. Br. 26).

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[25] Use of surplus water from government dams was not, as the complainants imply, a little understood concept, or a jurisdictional "catch all" for non hydroelectric uses of surplus water. Congress' concern in enacting the Federal Water Power Act was the encouragement of hydro power development, either by private interests constructing hydro projects, or utilization of existing or future government dams. Congressman Sims explained this situation:

> "It takes time, and it takes a long time, to build a tremendous dam. A water-power dam in some places, on some watercourses, is estimated to cost as high as $25,000,000. But there are a number of Government dams, navigation dams, *dams that have been built on navigable rivers* for the purpose of improving navigation, that are now unavailable simply because there is no law that permits their utilization. Those dams, or *the water produced by Government navigation dams*, can be made available immediately . . . ." 56 CONG. REC. 8929 (1918). (Emphasis added.)

There are several answers:

The legislative history shows that the surplus power or water clause was intended to be equally applicable to hydro plants located at government dams *on navigable and non-navigable streams.* Payment for the privilege of using surplus water created by government dams (as opposed to power created by private dams) was a crucial factor underlying the surplus water provision. The debates show a logical distinction between the amounts that a licensee ought to pay the United States if he built the dam that creates the power head, and the additional amounts that he ought to pay if he is allowed to make use of the head (and the flow of water) made available by construction of a government dam at federal expense (usually spoken of as a navigation dam, in the debates).[20]

As most (but not all) government dams were on navigable streams, the surplus power or water clause was of course intended to apply to hydro projects making use of navigable waters. *Ford* v. *Little Falls Fibre Co.*, 280 U.S. 369, 374 (1929), is an illuminating example.

The Court described the license as follows:

> ". . . The petitioner, a private business corporation, has procured from the Federal Power Commission a license for a hydroelectric power project, purporting to be granted under the Federal Water Power Act of June 10, 1920, 41 Stat. at L. 1063

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[20] *E.g.*, 56 Cong. Rec. 9912-13 (1918); 58 Cong. Rec. 2037, 2221-23 (1919); 59 Cong. Rec. 246 (1917).

[U.S.C. title 16, § 792]. *The license granted permission to use surplus water from the Federal dam for the development of power at a plant to be constructed and maintained by petitioner for that purpose on government land.* As the license also permits, but does not require, petitioner has placed flashboards on the crest of the dam, which, under normal conditions, raise the level of the water in the pool above the dam approximately 2 feet." (Emphasis added.)

The differences in duration and charges in the "project works" component and the "surplus water" component of a license or licenses are stated by the statute itself (Section 10(e)). The Commission's practice accords with the foregoing construction of the Act. It consistently requires[27] that a hydro project using water from a government dam on a navigable stream either obtain two licenses, or one license combining two features: (i) a project works license for 50 years at a set uniform nationwide annual charge, plus (ii) a surplus water license for an initial period of 20 years, renewable, for fees which vary with the quantity of water furnished from the government dam.[28]

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[27] See Appendix B for a list of 17 surplus water licenses issued by the Commission. All relate to waters now classed as navigable waters of the United States, with one possible exception, there noted.

[28] In some instances, as consideration for the use of surplus water at a government dam, the licensee is required to operate and maintain the dam and its hydraulic features. *E.g.*, Potomac Edison Co. of West Virginia, Project No. 2517, 35 F.P.C. 680, 681 (1966); Potomac Edison Co. of West Virginia, Project No. 2516, 35 F.P.C. 676, 677 (1966).

In short, the complainants are quite mistaken in their major premise, that the surplus water clause has no applicability to hydro projects on navigable streams, and are thus mistaken in their conclusion that this clause must have been meant to apply only to non-hydro projects on such streams, *e.g.*, steam plants.

As to power plants which do *not* use the head developed by a government dam, but are located downstream in a reach whose flow is affected by the upstream dam, complainants can cite no legislative history which would support a jurisdictional claim, even with reference to a hydro plant. The only case which has considered this question, *California Oregon Power Co.* v. *FPC*, 239 F.2d 426 (D.C. Cir. 1956), rejected the Commission's conclusion that a surplus water license was required.[29] Our opponents quote the Commission but not the Court (Opp. Br. 59).

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[29] The court held that no justiciable controversy over the meaning of "surplus water" was presented, inasmuch as a project works license was required in any event because of the plants' locations on a navigable stream. It said (p. 431): "The Commission has not ruled with clarity on what it considers 'surplus water' to be, or in any event what amount of it will be used by Copco, or when (if ever) Copco is to be charged for it, or at what rate."

P. 432: "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory."

CONCLUSION

We submit that:

1. The licensing jurisdiction of the Federal Power Commission with respect to "project works" is restricted to hydroelectric projects, and excludes steam-electric generating plants.

2. The further question of whether the Commission would have licensing jurisdiction with respect to the consumptive use by steam plants of "surplus water" from a government dam is not required to be decided in this Colorado River case, because here Congress has superseded the "surplus water" license with the requirement of a contract with the Secretary of the Interior for the use of waters of the Colorado River System stored by the government dams involved.

3. If, notwithstanding the superseding effect of the Colorado River statutes, the question were to be reached as to whether the jurisdiction of the Federal Power Commission to license the use of surplus water from a government dam encompasses use of such water by a steam-electric generating plant, the answer should be in the negative.

Respectfully submitted,

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APPENDIX A

Reports of the Secretary of the Interior made pursuant to congressional authorization for comprehensive planning for the use of the water and related resources of the Colorado River Basin.

1. U.S. Department of the Interior, A Report on the Colorado River Storage Project and Participating Projects, Providing for the Development and Utilization of the Water and Related Resources of the Upper Colorado River Basin, Pursuant to the Federal Reclamation Laws (1954).

2. U.S. Department of the Interior, Quality of Water: Colorado River Basin (1963, 1965, 1967, 1969, 1971, 1973).

3. U.S. Department of the Interior, Pacific Southwest Water Plan (1964).

4. U.S. Department of the Interior, Upper Colorado River Basin Cooperative Salinity Control Study (1969).

5. Water Resources Council, Lower Colorado Region Comprehensive Framework Study (1971).

6. Water Resources Council, Upper Colorado Region Comprehensive Framework Study (1971).

7. U.S. Department of the Interior, Southwest Energy Study: An Evaluation of Coal-Fired Electric Power Generation in the Southwest (1972).

8. U.S. Department of the Interior, Water Quality Improvement Program (1972).

9. U.S. Department of the Interior, Alternative Sources of Water for Prototype Oil Shale Development: Colorado and Utah (Draft) (1974).

10. U.S. Department of the Interior, Report on Water for Energy in the Upper Colorado River Basin (1974).

11. U.S. Department of the Interior, Westwide Study Report on the Critical Water Problems Facing the Eleven Western States (Draft) (1974).

APPENDIX B

Examples of Licenses for the Use of Surplus Water from Government Dams on Navigable Waters of the United States

1. John Hollis Bankhead Dam on the Black Warrior River, Project No. 2165, *Alabama Power Company*, 18 F.P.C. 327 (1957); 34 F.P.C. 971 (1965) (order fixing annual charges for use of government dam—$92,000 annually); 36 F.P.C. 658 (1966) (method used in setting annual charges for use of government dam).

2. United States Holt Lock and Dam on the Black Warrior River, Project No. 2203, *Alabama Power Company*, 34 F.P.C. 1108 (1965).

3. United States Dam No. 4 Hydro Station on the Potomac River, Project No. 2516, *Potomac Edison Co. of West Virginia*, 35 F.P.C. 676 (1966); 41 F.P.C. 194 (1969).

4. United States Dam No. 5 Hydro Station on the Potomac River, Project No. 2517, *Potomac Edison Co. of West Virginia*, 35 F.P.C. 680 (1966); 41 F.P.C. 395 (1969).

5. St. Anthony Falls on the Mississippi River, Project No. 2056, *Northern States Power Co.*, 17 F.P.C. 714, (1957); 10 F.P.C. 1322 (1951); 13 F.P.C. 1028 (1954) (order amending license to fix annual charge for use of government dam); 16 F.P.C. 1256 (1956).

6. Waterbury Dam, on the Waterbury River, Project No. 2090, *Green Mountain Power Corp.*, 13 F.P.C. 1211 (1954); 13 F.P.C. 1321 (1954).

7. Allegheny River Reservoir Dam on the Allegheny River, Project No. 2280, *Pennsylvania Electric Co.*, 34 F.P.C. 1566 (1965).

8. United States Lock and Dam No. 7 on the Mississippi River, Project No. 362, *Ford Motor Co.*, 9 F.P.C. 560 (1950); order of May 22, 1974.

9. United States Lock and Dam at Green Island, on the Hudson River, Project No. 13, *Niagara Mohawk Power Corp.*, 42 F.P.C. 56 (1969); 40 F.P.C. 1305 (1968).

10. Markland Dam, on the Ohio River, Project No. 2211, *Public Service Co. of Indiana*, 27 F.P.C. 115 (1957) (preliminary permit).

11. Winfield Project, on the Kanawha River, Project No. 1290, *Kanawha Valley Power Co.*, 5 F.P.C. 565 (1946).

12. United States Dam No. 7, on the Kentucky River, Project No. 539, *Kentucky Utilities Company* (FPC order approving license of Nov. 25, 1930); 5 F.P.C. 656 (1946) (amendment of license).

13. Englebright Dam and Reservoir, on the Yuba River, Project No. 2246, *Yuba County Water Agency*, 40 F.P.C. 1001 (1968); 35 F.P.C. 691 (1966); 29 F.P.C. 1002 (1963).

14. Pine View Dam, *Utah Power & Light Company*, 31 F.P.C. 958 (1964) (water diverted from government dam through a 5.5 mile wood-stave flowline) (in litigation).

15. Marmet and London Development, Project No. 1175, *Kanawha Valley Power Company*, 1 F.P.C. 322 (1936).

16. McAlpine Dam, Project No. 289, Kentucky-Louisville Gas and Electric Company, license issued on November 11, 1925. 1926 Annual Report of the Federal Power Commission, 35-37; 147-150.

17. Racine River Dam, Project No. 2570, Ohio Power Company, license issued on December 27, 1973.